THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA SITTING AT ARUA

CRIMINAL CASE No. 0219 OF 2014

UGANDA …………………………………………………… PROSECUTOR

VERSUS

PIWUN ALEX alias MUZEE …………………....................... ACCUSED

Before Hon. Justice Stephen Mubiru

JUDGMENT

The accused is indicted with one count of Aggravated Robbery c/s 285 and 286 (2) of *The Penal Code Act*. It is alleged that both accused on the 5th day of February 2013 at Acwera Trading Centre in Nebbi District robbed Okwai James of an unspecified amount of cash and immediately before that robbery threatened to use a deadly weapon, to wit, a gun on the said Okwai James.

The prosecution case briefly is that on the 5th day of February 2013 at around 8.00 pm, while the complainant Okwai James was in his shop, he was suddenly accosted by an assailant in full camouflaged army uniform who pointed a gun at him and demanded that he gives him all the money he had in the shop. The complainant called out to his wife who was in the room behind the shop, she came round the building to the front of the shop and only managed to see the back of the assailant from a distance of about four metres. The complainant picked the basin in which he had kept about three days' cash sales and threw it outside the shop, past the assailant. The assailant left the shop, picked the cash and boarded a getaway motorcycle that was waiting and fled the scene. Four days later on 9th February 2013, the complainant was summoned to Nebbi Police Station where he was able to identify the accused from an identification parade as the person who had robbed him. In his defence, the accused denied the indictment and raised an alibi. On the 5th February 2013 he was at Songoli Vilage in Zombo District that night at the funeral gathering for his deceased relative John Onen. The first time he came to know of the offence was when he was arrested on 6th February 2013 as he came out of Zeu Health Centre III where he had gone for treatment. He called two witnesses to support his alibi.

In his final submissions, the learned State Attorney Mr. Emmanuel Pirimba argued that all the ingredients had been proved and the accused ought to be convicted as indicted while counsel for the accused on state brief Ms. Winifred Adukule argued that whereas the first three ingredients of the offence had been proved, the prosecution had failed to prove the participation of the accused in the commission of the offence, since the evidence of identification was most unreliable. She prayed that the accused be acquitted. In their joint opinion, the assessors advised the court to find that the first three ingredients of the offence had been proved but to acquit the accused since the evidence of identification was unreliable.

The prosecution has the burden of proving the case against the accused beyond reasonable doubt. The burden does not shift to the accused person and he can only be convicted on the strength of the prosecution case and not because of weaknesses in his defence, (See *Ssekitoleko v. Uganda [1967] EA 531*). By his plea of not guilty, the accused put in issue each and every essential ingredient of the offence with which he is indicted and the prosecution has the onus to prove each of the ingredients of the offence beyond reasonable doubt. Proof beyond reasonable doubt though does not mean proof beyond a shadow of doubt. The standard is satisfied once all evidence suggesting the innocence of the accused, at its best creates a mere fanciful possibility but not any probability that the accused are innocent, (see *Miller Vs Minister of Pensions [1947] 2 ALL ER 372*).

For the accused to be convicted of Aggravated Robbery, the prosecution must prove each of the following essential ingredients beyond reasonable doubt;

1. Theft of property belonging to another.
2. Use or use threat of use of violence against the victim.
3. Possession of a deadly weapon during the commission of the theft.
4. The accused participated in commission of the theft.

Proving theft requires adducing evidence of what amounts in law to an asportation (that is carrying away) of the property of another without his or her consent. The property stolen in this case is alleged to have been an unspecified amount of cash. In proof of the element, the prosecution adduced the oral testimony of P.W.2 Okwai James and P.W.4 Atimango Jenifer his wife. They explained how on the night of 5th day of February 2013 an assailant came to their shop and demanded for money. P.W.2 said he had several days' cash sales in a basin which he

threw out of the door and the assailant took it away with him by means of a getaway motorcycle. P.W.4 said the money was in a paper box and her husband threw it to the assailant who picked and took it away with him. Failure to recover the cash allegedly stolen does not, in itself, negate the fact of theft. However, the article must be proved to have been stolen, for example by providing a sufficient description of the item. Although there is contradiction between P.W.2 and P.W.4 as to the container in which the money was, I find this to be a minor inconsistence which does not point to deliberate untruthfulness but rather one that seems to arise from mere forgetfulness of detail due to passage of time. I have therefore decided to ignore it. I note that counsel for the accused did not contest this ingredient in her final submissions. Having considered all the available evidence relating to this element, in agreement with the assessors, I find that the prosecution has proved beyond reasonable doubt that an unspecified amount of cash was stolen from Okwai James on the night of 5th February 2013.

Regarding the second ingredient, there must be proof of the use or threat of use of some force to overcome the actual or perceived resistance of the victim during the theft. In this respect, the prosecution still relies on the oral testimony of P.W.2 Okwai James and P.W.4 Atimango Jenifer his wife. They stated the assailant threatened to shoot P.W.2 if he did not hand over the cash. P.W.2 heard these commands from the assailant who initially spoke Swahili and later Alur as he brandished a rifle, pointing it at him. P.W.2 initially resisted but subsequently threw the money at the assailant. P.W.4 as well saw the assailant point the gun at her husband, the complainant. Counsel for the accused did not contest this ingredient during her final submissions. Having considered all the available evidence relating to this element, in agreement with the assessors, I find that the prosecution has proved beyond reasonable doubt that during the theft of cash from Okwai James, the assailant threatened him with the use of force if he did not hand over the money.

The prosecution was also required to prove that during that robbery, the assailant had a deadly weapon in his possession. According to section 286 (3) of *The Penal Code Act*, a deadly weapon is one which is made or adapted for shooting, stabbing or cutting and any instrument which, when used for offensive purposes, is likely to cause death. A gun or an imitation of a gun is a deadly weapon under the Act. In proof of this ingredient, the prosecution again relied on the oral testimony of P.W.2 Okwai James and P.W.4 Atimango Jenifer his wife. Both gave a description

of the weapon they saw as a rifle as the assailant pointed it at the complainant. Whether it was capable of firing or not is immaterial. Counsel for the accused did not contest this during her final submissions. Having considered all the available evidence relating to this element, in agreement with the assessors, I find that the prosecution has proved beyond reasonable doubt that the assailant had in his possession a deadly weapon during the commission of the robbery.

Lastly, the prosecution was required to adduce evidence placing the accused at the scene of crime not merely as a spectator but an active participant in its commission. The accused put up the defence of alibi. He stated he was at Songoli Vilage in Zombo District that night at the funeral gathering for his deceased relative John Onen. He has no duty of proving this alibi. It is the duty of the prosecution to disprove it. His alibi though is supported by D.W.2 Oling Felizina his mother and D.W.3 Bosco Chwinya-Ai his brother both of whom testified that they were together with the accused throught that night. I have noted a discrepancy as to the actual date the burial took place, with D.W.2 saying it was on 6th February 2013 while D.W.3 said it was on 7th February 2013. But both witnesses agree that the vigil began with the arrival of the body on 5th February 2013 and the accused was with them that night. In any event, weaknesses in the defence can only be used to corroborate an otherwise strong prosecution case. They cannot be used to fill gaps in the prosecution case.

In order to disprove this alibi, the prosecution relies firstly on the testimony of the two identifying witnesses; P.W.2 and P.W.4. Nevertheless, eyewitness evidence is not always perfect. Even the most well-intentioned witnesses can identify the wrong person or fail to identify the perpetrator of a crime. To sustain a conviction, a court may rely on identification evidence given by an eye witness to the commission of an offence. However, it is necessary, especially where the identification is made under difficult conditions, to test such evidence with the greatest care, and be sure that it is free from the possibility of a mistake. To do so, the Court evaluates the evidence having regard to factors that were favourable, and those that were unfavourable, to correct identification.

In his statement to the police recorded on 6th February 2013 and received in evidence as defence exhibit D.Ex.1, P.W.2 states as follows, “When the robber who I cannot recall his face, but was tall saw people were organising to attack...” However, in an additional statement recorded from

him on 8th February 2013 after picking the accused out from an identification parade and received in evidence as defence exhibit D.Ex.2, he stated as follows, "I saw his appearance properly by the aid of the light from the lamp. He is a tall slender man in army uniform. I can identify his facial appearance because I was at a close distance by the time I handed a container of money to him and while he was collecting the money to put in his pocket, I stood looking at his appearance." In his Identification Parade Report received in evidence as prosecution exhibit P.Ex.2, when explaining how the witness was able to identify the accused P.W.3 D/IP Okee Billy Boss stated, "they had a long time talk with the suspect (sic) who were two in number and there (sic) light on wholly they identified the suspect very well and they will never forget about his appearance."

In the instant case, the identification was done at night and the two identifying witnesses had never seen the assailant before. P.W.2, was inconsistent in explaining the source of light at the time. Whereas at the time he made his statement to the police he said it was from a lamp, during his testimony in court he said it was from a solar powered bulb at the front of the shop and a three big size dry cell powered torch used as a makeshift electric bulb inside the shop. Furthermore, the assailant had a cape on which possibly made facial identification very difficult and could be the explanation why in his initial statement to the police P.W.2 had indicated he could not recall his face. The circumstances were also stressful involving threats of death and brandishing of a gun. The attack took only a few minutes. His subsequent ability to remember the face of the assailant when he saw the accused during the identification parade is most doubtful. I observed this witness as he testified and for a considerable period of time during the examination in chief and after multiple direct questions put to him both by the learned State Attorney and by Court regarding what features he could remember about the assailant, he could only say that he was tall and slender. Mentioning facial appearance came long after what was a clear aforethought. I am therefore inclined to believe that at the scene, this witness was only able to observe the general physical appearance of the assailant rather than his facial appearance and all later references to facial appearance were exaggeration. On her part, P.W.4 saw only the back of the assailant and from a distance. At one point she was only peeping. In the circumstances, I find myself unable to conclude that this purported identification of the accused at the scene by the two witnesses was free from the possibility of error or mistake.

This was followed by an identification parade conducted three days later on 8th February 2013 at Nebbi Police Station. The testimony of P.W.2 and the defence of the accused revealed that some of the guidelines were flouted such as; all participants were suspects brought out of the police cells to participate in the parade. The voluntary participation of persons drawn from police cells is doubtful. The accused was not advised of his right to choose attire for the parade. He was instead required to appear bare chest at the parade along other bare chest suspects drawn from the police cells acting as volunteers. The accused stood out as the tallest in the parade, a number of participants were of lighter complexion than him and a number were much shorter and bigger than him. He was required to change positions after each identifying witness rather than advised that it was his choice. Although P.W.3 D/IP Okee Billy Boss stated that he followed the guidelines in organising the parade, I consider his statement to be based on defensive self interest. I am inclined to believe the witnesses he brought to identify the accused who in court pointed out all these flaws. Being lay people, they had nothing to defend about the propriety of the parade and narrated what they saw as they saw it. The guidelines exist to guarantee conduct of a fair and reliable identification procedure. They outline how a neutral, fair and reliable identification parade should be conducted. In light of these flaws, the credibility of the result of this parade is highly doubtful.

The veracity and reliability of the entire identification evidence is further cast in doubt considering that the prosecution did not adduce any evidence regarding the circumstances in which the accused was arrested. Article 23 (1) (c) of *The Constitution of the Republic of Uganda, 1995* provides the guarantee that no person should be deprived of personal liberty except, inter alia, upon reasonable suspicion that that person has committed or is about to commit a criminal offence under the laws of Uganda. Arrests should be based on reasonable suspicion. Reasonable suspicion is a standard, which requires the existence of more than a hunch, something more than an inchoate and un-particularised suspicion, but considerably below preponderance of the evidence. There should be a particularized and objective basis for suspecting a person of criminal activity. The prosecution owed the court a duty of adducing evidence that led to the arrest of the accused as a justification for subjecting him to an identification parade. I am aware of the decision in *Bogere Moses and Kamba Robert v. Uganda [1996] HCB 5* where it was held that evidence of arrest is essential but not fatal to the conviction of an accused. However in this case, in absence of that evidence, the entire edifice on which the subsequent identification parade was

built, crumbles since it is not clear on what basis the accused became a suspect to be lined up in an identification parade. Moreover, there is no evidence that the identifying witnesses were cautioned before being ushered before the suspects, that the person who committed the crime may or may not be in the lineup. This caution addresses the possibility of a witness feeling any self-imposed or undue pressure to make an identification. For that reason, inadvertent cues from P.W.3 D/IP Okee Billy Boss before and during the parade or inadvertent, suggestions towards a particular lineup member to the witnesses or the possibility of the witness having felt self-imposed or undue pressure to make an identification cannot be ruled out. The possibility that the witness could have felt compelled to identify a person with the closes similarities to the assailant he had seen rather than on basis of positive recognition too cannot be ruled out. In the circumstances, I consider it unsafe to convict on basis of a substantially flawed process that was unfairly skewed against the accused from the very beginning, right at the time of arrest.

Defence counsel vehemently contested this element in her final submissions. Having considered all the available evidence, I find that the prosecution evidence has failed to disprove the alibi set up by the accused person. The prosecution has as a result failed to prove that the accused participated in the commission of the offence. In agreement with the assessors, I find that the prosecution has failed to prove the case against the accused person beyond reasonable doubt and I accordingly find him not guilty and hereby acquit him of the offence of Aggravated Robbery c/s 285 and 286 (2) of *The Penal Code Act*. He should be set free forthwith unless held for other lawful reason.

Dated at Arua this 8th day of February, 2017. ……………………………………..

Stephen Mubiru

Judge.